Supreme Court, U.S.
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No. 10-

IN THE
Supreme Court of the United States

RUSSELL B. MULLINS,
Master-at-Arms First Class, United States Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the analysis used by the United States Court of Appeals for the Armed Forces to test for due process violations arising from excessive appellate delay contradicts this Court's decisions in *Strickland v. Washington*, *Ake v. Oklahoma*, and *United States v. Bagley*, and the tests used by a vast majority of the circuits, by testing for prejudice twice: first, in determining whether a due process violation exists; and second, in determining whether such violation was harmless beyond a reasonable doubt.

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PETITION FOR A WRIT OF CERTIORARI

Master-at-Arms First Class Russell B. Mullins, United States Navy, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces (CAAF) in this case.

OPINIONS BELOW

The 2010 opinion of the CAAF (App., *infra*, 1a-15a) is reported at 69 M.J. 113. The 2009 unpublished opinion of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) (App., *infra*, 16a-35a) is reported at 2009 CCA LEXIS 171.

JURISDICTION

The CAAF entered its opinion on June 28, 2010. Petitioner filed a timely petition for reconsideration on July 8, 2010. The CAAF denied this petition on August 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, Articles 71(c)(1) and 76a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 871(c)(1), 876a, and Secretary of the Navy

Instruction 1050.1A (May 1, 1986) are reproduced in Appendix (App., *infra*, 36a-44a).

STATEMENT

Master-at-Arms First Class Russell B. Mullins was convicted by a general court-martial of rape of a child, forcible sodomy of a child, indecent acts, and two specifications of possession of child pornography, in violation of Articles 120, 125, and 134 of the UCMJ.[1] On December 7, 2006, the NMCCA dismissed one of the child pornography specifications, but affirmed the remaining findings of guilty and the sentence. On May 9, 2008, the CAAF set aside the decision of the NMCCA and remanded the case for further review of an issue unrelated to this petition.

Upon its second review on May 14, 2009, the NMCCA again affirmed the findings of guilty and the sentence. The CAAF again granted review and, on June 28, 2010, the CAAF affirmed the decision of the NMCCA.

INTRODUCTION

A convicted servicemember is not discharged from the United States military until the completion of that servicemember's criminal appeal.[2] While the servicemember's appeal is pending, he is in a unique limbo status called "appellate leave" during which he

[1] 10 U.S.C. §§ 920, 925, and 934 (2000).
[2] Article 71(c), UCMJ, 10 U.S.C. § 871(c).

is still a member of the military, yet does not receive pay.[3] He is therefore responsible to support himself upon his release from confinement, despite the fact that he has not been discharged.

As a convicted but undischarged member of the military, a servicemember faces an array of challenges unique to his status. Because such a servicemember is not given his DD-214 discharge certificate until the completion of his appeal, he may have difficulty obtaining a job from an employer unwilling to hire a new employee who is technically still in the military.[4] Similarly, the servicemember may have difficulty obtaining unemployment benefits from a government agency that still believes he is employed by the military.[5] Thus, any delay in the resolution of a convicted servicemember's appeal necessarily increases the length of time he could potentially suffer prejudice arising from his "appellate leave" status.

Despite facing a brand of prejudice unknown to his civilian counterpart, a convicted servicemember must overcome a special hurdle to obtaining relief for a due process violation arising from excessive appellate delay - the CAAF's application of a test for harmlessness beyond a reasonable doubt after it finds a post-trial due process violation. This test conflicts with: (1) this Court's precedent for analyzing constitutional error,

[3] Article 76a, UCMJ, 10 U.S.C. § 876a; Secretary of the Navy Instruction 1050.1A (May 1, 1986).

[4] *See, e.g., United States v. Jones*, 61 M.J. 80, 84 (C.A.A.F. 2005).

[5] *United States v. Mullins*, 69 M.J. 113, 118-19 (C.A.A.F. 2010).

when prejudice is already an element of the test for error; and (2) the test used by every other federal circuit which applies the *Barker v. Wingo* factors to determine whether a post-trial due process violation has occurred.

REASON FOR GRANTING THE PETITION

While this Court has never recognized a Constitutional right to a timely appeal, the United States and the individual states may independently grant such a right.[6] Once provided, however, the right to appeal must comport with the requirements of due process.[7]

Every federal circuit and the CAAF have explicitly recognized the due process right to a timely appeal.[8] Almost every circuit has analogized this right with the Sixth Amendment right to a speedy trial.[9] Recognizing the similar variables at play,

[6] *Ross v. Moffit*, 417 U.S. 600, 611 (1974).

[7] *Evitts v. Lucy*, 469 U.S. 387, 392 (1985).

[8] *United States v. Deleon*, 444 F.3d 41 (1st Cir. 2006); *Simmons v. Reynolds*, 898 F.2d 865 (2nd Cir. 1990); *Simmons v. Beyer*, 44 F.3d 1160 (3rd Cir. 1995); *United States v. Johnson*, 732 F.2d 379 (4th Cir. 1984); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980); *United States v. Smith*, 94 F.3d 204 (6th Cir. 1996); *Allen v. Duckworth*, 6 F.3d 458 (7th Cir. 1993); *United States v. Hawkins*, 78 F.3d 348 (8th Cir. 1996); *United States v. Mohawk*, 20 F.3d 1480 (9th Cir. 1994); *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994); *United States v. Rodriguez*, 259 Fed. Appx. 270 (11th Cir. 2007); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

[9] *See, e.g., Rheuark*, 628 F.2d at 302-03; *Simmons*, 44 F.3d at 1169; *Simmons*, 898 F.2d at 868; *Hawkins*, 78 F.3d at 350-51; *but see, Deleon*, 444 F.3d at 56-57.

these circuits have borrowed this Court's speedy trial analysis from *Barker v. Wingo*[10] and applied it when analyzing due process violations arising from excessive appellate delay.[11]

In *Barker*, this Court identified four factors to balance when examining an alleged speedy trial violation: the length of the delay; the reason for the delay; the defendant's assertion of his right to speedy trial; and prejudice to the defendant.[12] "None of the four factors [are] a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant."[13]

The CAAF has also borrowed the *Barker* four-factor test and applies it in evaluating post-trial delay.[14] But the CAAF's application of this test is unique: after the CAAF applies the *Barker* test and determines that a due process violation has occurred, it then tests that violation for harmlessness beyond a reasonable doubt.[15] This unique twist is an application of this Court's decision in *Chapman v. California*[16] - holding that constitutional errors may be tested for harmlessness beyond a reasonable

[10] 407 U.S. 514 (1972).
[11] *See, e.g., Rheuark*, 628 F.2d at 302-03; *Simmons*, 44 F.3d at 1169; *Simmons*, 898 F.2d at 868; *Hawkins*, 78 F.3d at 350-51.
[12] 407 U.S. at 530.
[13] *Barker*, 407 U.S. at 533.
[14] *Moreno*, 63 M.J. at 135-36.
[15] *See, e.g., United States v. Bush*, 68 M.J. 96 (C.A.A.F. 2009).
[16] 386 U.S. 18 (1967).

doubt - to an analysis of due process violations arising from untimely appeals.[17]

And the CAAF does not merely apply the same prejudice analysis twice. It has stated that its review of *Barker's* prejudice prong differs substantively from its review of prejudice in its harmlessness beyond a reasonable doubt analysis. Under *Barker's* fourth prong, according to the CAAF, prejudice is defined as "oppressive incarceration, undue anxiety, and limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired."[18] The CAAF's prejudice analysis under its harmless beyond a reasonable doubt test, on the other hand, evaluates the same record for prejudice under a different scope with a different burden.[19] Specifically, it applies a *de novo* review of the totality of the circumstances surrounding the delay to determine whether the post-trial delay was harmless beyond a reasonable doubt.[20]

This additional test conflicts with precedent set by this Court in *Strickland v. Washington*,[21] *Ake v. Oklahoma*,[22] and *United States v. Bagley*.[23] In each of these cases, the substantive test for constitutional error already contained a test for prejudice or its functional equivalent. Because of

[17] *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).
[18] *Bush*, 68 M.J. at 103.
[19] *Id.*
[20] *Id.* at 103-04.
[21] 466 U.S. 668 (1984).
[22] 470 U.S. 68 (1985).
[23] 473 U.S. 667 (1985).

this, this Court has been unwilling to test for harmlessness beyond a reasonable doubt.

In *Strickland v. Washington*, for example, this Court identified two factors that must be met in order to sustain a claim for ineffective assistance of counsel: (1) deficient performance by an attorney; and (2) "a reasonable probability that but for counsel's professional errors, the result of the proceeding would have been different."[24] As this Court identified a prejudice element in the substantive test, it did not then adopt a second test for harmlessness beyond a reasonable doubt. To do so would lead to unreasonable results. If an appellant has established "a reasonable probability" that the result of the proceeding would have been different, it would be inconsistent and illogical to then provide the Government with an opportunity to prove harmlessness beyond a reasonable doubt.

Likewise, in *Ake v. Oklahoma*, this Court examined whether the State's denial of a defendant's access to a competent psychiatrist rose to the level of a due process violation where the defendant had raised questions about his sanity at the time of his offense.[25] This Court concluded that the critical analysis looks at "the probable value that the assistance of a psychiatrist [would] have in this area, and the risk attendant in its absence."[26] Thus, a test for prejudice was built into this Court's test for a due process violation resulting from the denial of psychiatric assistance. As such, it would be

[24] 466 U.S. at 693-94.
[25] 470 U.S. at 83.
[26] 470 U.S. at 84.

contradictory to again test for prejudice under a different standard by looking for harmlessness beyond a reasonable doubt, and this Court chose not to do so.

Similarly, in *Bagley*, this Court refined its test from *Brady v. Maryland*[27] and held that nondisclosure of favorable evidence results in a due process violation if: (1) the Government fails to disclose evidence favorable to an accused; and (2) there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different.[28] Again, this Court does not then apply a subsequent test for harmlessness.

The post-trial due process analyses of the circuits conform to this Court's precedent and contrast with that of the CAAF. While many of the circuits have adopted the four-prong *Barker* test as their framework for analyzing appellate delay, none of those circuits have utilized a harmlessness beyond reasonable doubt test after finding a due process violation.[29]

The CAAF's application of its test in Petitioner's case

Petitioner was convicted by a general court-martial on April 6, 2001. Despite repeated demands for speedy resolution of his appeal, appellate review

[27] 373 U.S. 83 (1963).

[28] 473 U.S. at 674, 682-84.

[29] *See, e.g., Simmons*, 898 F.2d 865; *Simmons*, 44 F.3d 1160; *Johnson*, 732 F.2d 379; *Rheuark*, 628 F.2d 297; *Smith*, 94 F.3d 204; *Allen*, 6 F.3d 458; *Hawkins*, 78 F.3d 348; *Mohawk*, 20 F.3d 1480; *Harris*, 15 F.3d 1538; *Rodriguez*, 259 Fed. Appx. 270.

of Petitioner's conviction was not completed until June 28, 2010, over nine years later. The majority of this delay was attributable to understaffing of the United States Navy's Appellate Defense Division, which resulted in numerous requests for enlargements of time from Petitioner's assigned counsel. The CAAF has examined chronic delays caused by understaffing at the Navy's Appellate Defense Division during this period, and has attributed these delays to the Government, which has ultimate responsibility for adequately supporting the Navy's appellate defense needs with sufficient resources.[30]

At NMCCA and the CAAF, Petitioner outlined several ways in which he was prejudiced by his excessive appellate delay: he endured oppressive incarceration while awaiting the resolution of his appeal; he had difficulty obtaining employment benefits because of his lack of a DD-214 discharge certificate; he suffered undue anxiety arising from his registration as a sex offender; and his legal proceedings related to his child custody and visitation issues were impaired.

Without discussing whether Petitioner met or failed to meet any of the *Barker* factors, in particular without discussing whether Petitioner suffered prejudice within the meaning of the *Barker* prejudice prong, the CAAF assumed a due process violation had occurred. The court then concluded that the due

[30] 63 M.J. at 137 ("The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation").

process violation was harmless beyond a reasonable doubt because Petitioner failed to adequately substantiate his claims of prejudice.[31]

Because the CAAF assumed a due process violation and was silent about whether Petitioner suffered any prejudice within the meaning of *Barker's* fourth prong, this Court is left to speculate as to two possible scenarios. Each scenario leads to an unsettling conclusion about the effect the CAAF's harmlessness test had upon the resolution of Petitioner's case.

Assuming Petitioner *had* suffered prejudice within the meaning of the fourth *Barker* prong, then it is axiomatic that the Government could not have proven that the due process violation was harmless beyond a reasonable doubt.[32]

Assuming, on the other hand, that Petitioner *had not* suffered prejudice within the meaning of the fourth *Barker* prong, yet a balancing of the strength of the three other factors justified finding a due process violation, then the CAAF's application of its harmless error test effectively removes prejudice from the *Barker* balancing test and makes it a necessary prerequisite to finding a due process violation – a result that conflicts with the CAAF's repeated statement that no single factor of the *Barker* test is required for finding a due process violation.[33]

[31] *Mullins*, 69 M.J. at 118-119.

[32] *See Strickland*, 466 U.S. at 693-94; *Ake*, 470 U.S. at 83-84; *Bagley*, 473 U.S. at 674, 682-84.

[33] *Mullins*, 69 M.J. at 118, fn. 2, (citing *Bush*, 68 M.J. at 103; *Moreno*, 63 M.J. at 136); *United States v. Toohey*, 63 M.J. 353,

The CAAF's test for harmlessness beyond reasonable doubt thus conflicts with this Court's precedent in *Strickland*, *Ake*, and *Bagley*, and the CAAF's adoption of the principle, derived from *Barker*, that no *Barker* factor is dispositive or required to a finding of a due process violation stemming from excessive appellate delay. Once a due process violation is established, even in the absence of prejudice, the CAAF should turn to remedying such a violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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361-62 (C.A.A.F. 2006).

APPENDIX

2010 Court of Appeals for the Armed Forces decision

UNITED STATES, Appellee, v. Russell B. MULLINS, Master-at-Arms First Class, U.S. Navy, Appellant

No. 07-0401

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

69 M.J. 113; 2010 CAAF LEXIS 541

April 20, 2010, Argued
June 28, 2010, Decided

SUBSEQUENT HISTORY: Reconsideration denied by *United States v. Mullins, 2010 CAAF LEXIS 706 (C.A.A.F., Aug. 16, 2010)*

PRIOR HISTORY: Crim. App. No. 200200988. Military Judge: Robert B. Wities.
United States v. Mullins, 2009 CCA LEXIS 171 (N-M.C.C.A., May 14, 2009)

COUNSEL: For Appellant: Major Anthony W. Burgos, USMC (argued); Lieutenant Kathleen L. Kadlec, JAGC, USN (on brief).

For Appellee: Brian K. Keller, Esq. (argued); Lieutenant Timothy H. Delgado, JAGC, USN (on brief); Colonel Louis J. Puleo, USMC, and Lieutenant Duke J. Kim, JAGC, USN.

JUDGES: BAKER, J., delivered the opinion of the Court, in which EFFRON, C.J., and ERDMANN, STUCKY, and RYAN, JJ., joined.

OPINION BY: BAKER

OPINION

Judge BAKER delivered the opinion of the Court.

A general court-martial composed of members convicted Appellant, contrary to his pleas, of rape of a child, forced sodomy of a child, two specifications of indecent acts and two specifications of possession of child pornography, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 920, 925,* and *934 (2000),* respectively. The adjudged and approved sentence included a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The United States Navy-Marine Corps Court of Criminal Appeals (CCA) dismissed one of the specifications of child pornography, but affirmed the remaining findings of guilt and the sentence. *United States v. Mullins, No. NMCCA 200200988, 2006 CCA LEXIS 327, at *46,* [*115] *2006 WL 4573011, at *16 (N-M. Ct. Crim. App. Dec. 7, 2006)* (unpublished). In 2008, this Court granted review of two issues, including one regarding expert

testimony on the frequency of false positives in cases of child molestation. The Court set-aside the decision of the CCA and remanded for a new Article 66(c), UCMJ, *10 U.S.C. § 866(c) (2006)*, review. *United States v. Mullins, 66 M.J. 468 (C.A.A.F. 2008).*

In the second CCA opinion, the court held that while there was error in allowing the expert to testify about the children's veracity, for the purposes of plain error review it was neither obvious nor prejudicial in light of the military judge's instructions. *United States v. Mullins, No. NMCCA 200200988, 2009 CCA LEXIS 171, at *15, 2009 WL 1393229, at *6 (N-M. Ct. Crim. App. May 14, 2009)* (unpublished). The CCA adopted the other conclusions from the first CCA opinion. *Id. at *22-*23, 2009 WL 1393229, at *8.* We granted review of the following issues:

> I. WHETHER THE LOWER COURT ERRED IN HOLDING THAT THERE WAS NOTHING IMPERMISSIBLE IN THE MILITARY JUDGE ALLOWING THE GOVERNMENT TO INTRODUCE LIE DETECTOR TESTIMONY IN VIOLATION OF MILITARY RULE OF EVIDENCE 702.
>
> II. WHETHER THE LOWER COURT DENIED APPELLANT DUE PROCESS WHEN IT DENIED HIM RELIEF DUE TO EXCESSIVE POST-TRIAL PROCESSING DELAY AND DENIED HIS SUPPLEMENTAL ASSIGNMENTS OF ERROR.

We hold that it was error to admit expert testimony from which members could infer there was a 1 in 200 chance that the allegations were false. However, we conclude that the error did not materially prejudice Appellant's substantial rights in light of the military judge's corrective instructions and the time at which they occurred. Additionally, Appellant's due process rights were not violated because the post-trial delay in this case was not prejudicial.

I. EXPERT TESTIMONY

A. *Background*

Appellant had two daughters with Tiffany Miller, DM and SM, who were nine years old and seven years old respectively, at the time of the offenses. On June 18, 2000, DM told her mother that Appellant had done "rude things" to her. A few days later, both girls were interviewed by a forensic specialist and a few weeks later they were examined by a sexual assault nurse examiner. DM and SM testified that between June 1999 and January 2000, Appellant forced them to perform indecent acts on him, including oral sex and masturbation. SM testified that she had been raped. The girls also stated that Appellant had child pornography on his computer and forced them to watch those materials.

During the trial, Cynthia Conrad, a forensic child interviewer for the Kitsap County prosecutor's office, testified about the types of interviews she performs. She stated that a normal seven- to nine-year-old child might understand sexual intercourse but would

not understand oral or anal sex, male masturbation, or ejaculation. She also testified that the characteristics she saw in the victims' interviews were "consistent . . . with a child who had been sexually abused or . . . a child who may have been sexually abused." In response to her testimony, the military judge gave a sua sponte instruction, stating:

> [N]o witness is a human lie detector. That is no one -- no one who testifies in this courtroom can know if someone else is telling the truth or lying. You are advised that only you, the members of this court, can determine the credibility of the witnesses and what the ultimate facts of this case are. No witness, including an expert witness, can testify that someone else's account of what happened is true or credible, that a person believes the alleged victim or that, in fact, a sexual encounter actually occurred.

On redirect, Ms. Conrad testified about the frequency of children lying about sexual abuse, saying that it was less than "1 out of 100 or 1 out of 200." The military judge then asked Ms. Conrad:

> [D]o you have any forensic, that is, scientifically accurate way of proving whether the child is telling the truth or not? In other words . . . the only way that you typically could know that is if the child later comes forth and says 'Yes, I made it up,' or . . . unless that [defendant]

> ultimately confesses, you would ultimately never know who was telling the truth and who wasn't, is that correct?

Ms. Conrad responded affirmatively: "That's correct." There was no objection at trial and defense counsel cited this last bit of testimony during his closing argument.

B. *Analysis*

Appellant argues that the military judge erred by admitting testimony from Ms. Conrad about the frequency with which children make false claims of sexual abuse. Appellant argues that the members might infer from the expert's testimony about children generally an equivalent situation in Appellant's case, i.e., that there was a 1 in 200 chance that Appellant was innocent. As a result, Appellant contends that the military judge should have provided an immediate corrective instruction to the members and struck the testimony from evidence, so that he would not be materially prejudiced.

"Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error." *United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007)* (citing Military Rule of Evidence (M.R.E.) 103(d)). In this case, defense counsel did not object to Ms. Conrad's testimony during the trial. The plain error standard is met when "(1) there is error, (2) the error is plain or obvious, and (3) the

error results in material prejudice to a substantial right of the accused." *United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)* (citing *United States v. Rodriguez, 60 M.J. 87, 88-89 (C.A.A.F. 2004)*); *United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000)*. "Our standard of review for determining whether there is plain error is de novo." *Brooks, 64 M.J. at 328* (citing *United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002)*).

1. *The error in this case*

In a trial involving the sexual assault of a child, "'[a]n expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms.'" *United States v. Birdsall, 47 M.J. 404, 409 (C.A.A.F. 1998)* (quoting *United States v. Harrison, 31 M.J. 330, 332 (C.M.A. 1990)*). "However, an expert may not testify regarding the credibility or believability of a victim, or 'opine as to the guilt or innocence of an accused.'" *United States v. Cacy, 43 M.J. 214, 217 (C.A.A.F. 1995)* (quoting *United States v. Suarez, 35 M.J. 374, 376 (C.M.A. 1992)*); *see also Brooks, 64 M.J. at 328* & nn. 2-3.

This case is similar to *Brooks*. There an expert witness testified that the frequency of false sexual abuse allegations was approximately five percent. *Brooks, 64 M.J. at 327*. This Court concluded that such testimony was "the functional equivalent of saying that the victim in a given case is truthful and should be believed" and held that the military judge erred by admitting it. *Id. at 329*. The testimony in this case also involves a statistical statement of how

often false accusations of sexual abuse occur, raising the risk that the members would infer an equivalent likelihood in Appellant's case. Such an inference derived from expert testimony would invade the province of the court members to determine the credibility of witnesses. Our conclusion is that it was error to admit the statistical testimony in Appellant's case. An expert inference that there is a 1 in 200 chance the victim is lying undermines the duty of the panel members to determine guilt beyond a reasonable doubt.

2. *The error was plain and obvious*

There are several reasons supporting our determination that the error was plain and obvious in this case. First, on direct review, we apply the clear law at the time of appeal, not the time of trial. *United States v. Harcrow, 66 M.J. 154, 159 (C.A.A.F. 2008)* (citing *Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)).* This case was at the CCA when *Brooks*, a case holding that expert testimony about the statistical frequency of children lying about sexual abuse is inadmissible, was decided. *64 M.J. at 328-30.* In *Brooks*, we concluded there was plain error. Therefore, it follows that an error that was plain and obvious in *Brooks* would be plain and obvious in a subsequent case when there were no intervening changes in the law.

Second, related case law at the time of trial also supports the conclusion that the error in this case was plain and obvious. In *United States v. Banks*, for example, this Court cautioned against expert statistical testimony that placed an accused within a

definitive profile suggesting guilt. *36 M.J. 150, 161-63 (C.M.A. 1992).* Although after Appellant's trial, *United States v. Traum* echoed this concern. We reversed, finding that the expert's "statement placed a statistical probability on the likelihood that Appellant committed the offense." *60 M.J 226, 235-36 (C.A.A.F. 2004).*

Third, the error in this case was apparent to the military judge. This is evident in the military judge's sound decision to immediately issue a corrective instruction on the role of members when the expert initially stated that the children's statements were consistent with those of children who had been abused. He reiterated this instruction, in generic form, before the members recessed for deliberations. He also asked a clarifying question directly after the problematic testimony. Thus, while the military judge's action in addressing the testimony was commendable, it also supports the conclusion that the erroneous nature of the testimony was obvious to him at the time. The question is whether these remedial steps were sufficient to cure any potential prejudice arising from the statistical statement.

3. *Prejudice*

The last step in plain error analysis is to test whether an error materially prejudiced Appellant. Prejudice results when there is "undue influence on a jury's role in determining the ultimate facts in the case." *Birdsall, 47 M.J. at 411.* We look at the erroneous testimony in context to determine if the witness's opinions amount to prejudicial error. *United States v. Eggen, 51 M.J. 159, 161 (C.A.A.F.*

1999). Context includes such factors as the immediate instruction, the standard instruction, the military judge's question, and the strength of the government's case -- to determine whether there was prejudice.

"Absent evidence to the contrary, court members are presumed to comply with the Military Judge's instructions." *United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003).* Here, the military judge gave an instruction at the end of Ms. Conrad's direct examination, as well as before deliberations. The timing of these instructions distinguishes this case from *Brooks*, where the military judge only instructed the panel before the members deliberated, a fact noted and relied upon by this Court. *64 M.J. at 330.* Here, the military judge gave an instruction on credibility, ensuring that the panel members would know their role and not accept the percentage testimony as a proxy for credibility. We also find it hard to fault the military judge for not repeating the same instruction shortly after he gave it the first time.[1] If the members complied with the instructions then Ms. Conrad's testimony should not have inappropriately bolstered the victims' credibility.

1 The record of trial has only seven pages of testimony between the military judge's first instruction and the expert's statistical testimony (during which time there was only a six-minute recess).

The military judge also asked Ms. Conrad a clarifying question, the answer to which indicated that she did not have "a scientifically accurate way of

proving whether [a] child is telling the truth or not," thus minimizing the impact of her testimony. Because of the military judge's questions, the CCA found that the testimony was based on the expert's personal experience, instead of scientific studies. As a result, the testimony did not carry the same weight with the panel members as the testimony offered in *Brooks*. Thus, while Appellant is correct that a judicial question is not the same as a corrective instruction, we are hard-pressed not to conclude that, given the timing of the first instruction as well as the question and subsequent answer, the taint from the statistical evidence was cured.

Appellant argues that the testimony was prejudicial because it supplemented and buttressed a weak case. As in *Brooks*, the Government had "no other direct witnesses, no confession, and no physical evidence to corroborate the victim's sometimes inconsistent testimony." *Brooks, 64 M.J. at 330.* However, here there was corroborating evidence upon which the court members could rely. Both victims testified and were fully cross-examined. Non-relative witnesses testified about the fear the girls had of their father. The victims' testimony was supported by the presence of child pornography, illicit instant message chat sessions found on Appellant's computer, and the properly admitted testimony of the expert witness. In short, the members had other reasons to believe the victims. Therefore, in this case, we conclude there was sufficient other evidence and the members were properly instructed such that we are convinced that they were able to come to a decision in the case

without relying on any credibility determinations offered by Ms. Conrad. Appellant has failed to demonstrate prejudice.

II. POST-TRIAL DELAY AND DUE PROCESS

A. *Background*

Appellant's trial was completed on April 6, 2001, but the convening authority's action did not occur until April 4, 2002, over 360 days later. Then 448 days elapsed between the date the record was docketed with the CCA and the date of the first appointed appellate defense counsel's initial contact with Appellant. Appellant had, in succession, four separate appointed appellate attorneys. He filed various writs and motions pro se, including complaints about delay in the appellate process.

Appellant was released from confinement on March 9, 2007, and was immediately placed on appellate leave status. According to the appellate record, he then applied for unemployment insurance from the state of California on May 4, 2007. A few days later he received notice from the California unemployment office that it could not give him benefits because he was still on appellate leave status and had not received a DD-214.

B. *Analysis*

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006); United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004).* When

considering appellate delay, a court must balance four factors: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno, 63 M.J. at 135* (citing *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).* Where an appellant meets his burden in demonstrating unreasonable appellate delay, the burden shifts to the government to show that the due process violation was harmless beyond a reasonable doubt. *United States v. Ashby, 68 M.J. 108, 125 (C.A.A.F. 2009).* Even assuming a due process violation occurred in this case, [2] we hold that it was harmless beyond a reasonable doubt because the record contains no evidence of prejudice warranting relief.

> 2 "'[No] single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.'" *United States v. Bush, 68 M.J. 96 at 103 n.8 (C.A.A.F. 2009)* (quoting *Moreno, 63 M.J. at 136*).

In examining the Government's burden to show harmlessness beyond a reasonable doubt, we review Appellant's three arguments regarding prejudice: the delay kept him from receiving unemployment benefits because he lacked a DD-214, it increased his anxiety because he had to register as a sex offender, and "[a] more timely appeal . . . would have enabled him to initiate legal proceedings to obtain visitation and legal custody of his now-grown children." Since Appellant has not prevailed on the expert testimony issue, he cannot claim that the delay hurt his ability

to retry the case or would have enabled him to seek custody of his children in a more timely fashion. *Moreno, 63 M.J. at 140.*

The question of unemployment benefits is a closer call. Appellant asserts that if his appeal had been adjudicated with less delay he would no longer be on appellate leave and would have received unemployment benefits. Appellant argues this is analogous to "recognized interference with post-military employment opportunities as a form of prejudice that warrants relief for unreasonable post-trial delay." *United States v. Jones, 61 M.J. 80, 84 (C.A.A.F. 2005)* (citing *United States v. Sutton, 15 M.J. 235 (C.M.A. 1983)).* The appellate question is not whether such a scenario could amount to prejudice; it could. The question is whether the record reflects that such prejudice existed in this case.

We conclude that the record does not demonstrate that it was Appellant's leave status that kept him from receiving the benefits and that he would not have been denied on some other grounds. [3] *See Bush, 68 M.J. at 103 n.8.* In *United States v. Schweitzer, 68 M.J. 133, 138-39 (C.A.A.F. 2009),* and *Ashby, 68 M.J. at 125,* this Court denied the appellants' assertions that post-trial delay was prejudicial because it caused difficulty in finding adequate employment. In *Ashby*, as in *Jones*, the Court was provided with affidavits from would-be employers supporting the appellants' claims. *68 M.J. at 125 n.11* (*Ashby*); *61 M.J. at 81* (*Jones*). The record in this case does not contain an equivalent affidavit, nor does it contain any other authoritative evidence

that a person in Appellant's circumstances would have been eligible for unemployment benefits and received them once his appeal was final. Having carefully examined the entire record and finding no convincing evidence of prejudice, we conclude that, under the totality of the circumstances, the post-trial delay was harmless beyond a reasonable doubt.

3 Appellant filed two motions with this Court on April 16, 2010, that were denied. One was to take judicial notice of a sixteen-page printout from the California Employment Development Department addressing employment benefits and misconduct generally. The other motion was to attach a California Unemployment Insurance Program fact sheet and the Appellant's most recent Social Security statement. Neither directly addressed Appellant's circumstances.

CONCLUSION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

2009 Navy-Marine Corps Court of Criminal Appeals Decision

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RUSSELL B. MULLINS
MASTER-AT-ARMS FIRST CLASS (E-6), U.S. NAVY

NMCCA 200200988
GENERAL COURT-MARTIAL

Sentence Adjudged: 06 April 2001.
Military Judge: CDR Robert Wities, JAGC, USN.
Convening Authority: Commander, Naval Air Warfare Center Weapons Division, Point Mugu, CA.
Staff Judge Advocate's Recommendation: LCDR D.C. Peck, JAGC, USN.

For Appellant: LT Kathleen Kadlec, JAGC, USN.
For Appellee: LT Duke Kim, JAGC, USN.

14 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

O'TOOLE, Chief Judge:

Contrary to his pleas, a general court-martial composed of members with enlisted representation convicted the appellant of rape of a child under 16 years of age, sodomy of a child under 16 years of age, two specifications of indecent acts upon a child under 16 years of age, possession of child pornography that had been transported in interstate commerce, and possession of child pornography on Federal property, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The appellant was sentenced to confinement for 10 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The sentence was approved by the convening authority as adjudged.

Upon direct review, this court set aside the specification of possession of child pornography that had been transported in interstate commerce. We reassessed the sentence, and affirmed the remaining

findings and sentence as reassessed. *See United States v. Mullins*, No. 200200988, 2006 CCA LEXIS 327, unpublished op. (N.M.Ct.Crim.App. 7 Dec 2006).

On 13 February 2008, the United States Court of Appeals for the Armed Forces (CAAF) granted a petition for review on two issues. *United States v. Mullins*, 66 M.J. 188 (C.A.A.F. 2008).[1] On 9 May 2008, the CAAF set aside our previous decision and, in a summary disposition, remanded the case for a new Article 66(c), UCMJ review, specifically including consideration of the first granted issue in light of *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007). *United States v. Mullins*, 66 M.J. 468 (C.A.A.F. 2008). The appellant has reasserted two assignments of error addressed in this court's earlier decision.[2] We will address these four

[1] The two issues are:

> I. WHETHER THE LOWER COURT ERRED IN HOLDING THAT THERE WAS NOTHING IMPERMISSIBLE IN THE MILITARY JUDGE ALLOWING THE GOVERNMENT TO INTRODUCE LIE DETECTOR TESTIMONY IN VIOLATION OF MILITARY RULE OF EVIDENCE 702;
> II. WHETHER THE LOWER COURT DENIED APPELLANT DUE PROCESS WHEN IT DENIED HIM RELIEF DUE TO EXCESSIVE POST-TRIAL PROCESSING DELAY AND DENIED HIS SUPPLEMENTAL ASSIGNMENT OF ERROR.

These assignments of error were originally the sixth, twelfth, Supplemental I, and Supplemental II assignments of error. *See Mullins*, 2006 CCA LEXIS 327 at n8.

[2] Factual and legal sufficiency of the child pornography

assigned errors. As to the assignments of error not specifically discussed in this opinion, we adopt the decision of our predecessor panel. That opinion also documents the pertinent facts relevant to the appellant's current and prior appeals, including the extensive post-trial litigation in this case. We adopt those facts as our own. Other facts will be provided as needed *infra*.

Human Lie Detector Testimony

The first issue returned to us for examination is whether, in light of *Brooks*, the military judge erred in permitting the testimony of a child sexual abuse expert, which the appellant asserts included "lie detector" testimony.[3]

As our superior court noted in *Brooks*, 64 M.J. at 328:

> [A] military judge's decision to admit expert testimony [is reviewed] under an abuse of discretion standard. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006); *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006); *Kasper*, 58 M.J. at 318 . . . . Where an appellant has not preserved

offenses; and the military judge's error in allowing admission of bad character evidence, in the form a remnant of an online chat, in violation of MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

[3] This was the appellant's original sixth assignment of error.

> an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error. M.R.E. 103(d). To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005); *United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006); *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). Our standard of review for determining whether there is plain error is de novo. *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002). . . .

In cases involving allegations of sexual abuse of a child, a qualified expert is permitted to inform the fact finder of characteristics commonly found in sexually abused children, and to describe the characteristics exhibited by the alleged victim. *United States v. Birdsall*, 47 M.J. 404, 409 (C.A.A.F. 1998). A health care provider may also express an opinion that a victim's conduct or statements are consistent with sexual abuse, or are consistent with complaints of sexually abused children. *Id.* at 410; *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990). An expert witness may not, however, serve as a "human lie detector." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000); *Birdsall*, 47 M.J. at

410. Child abuse experts may not offer an opinion about whether the alleged victim was subjected to sexual abuse, or whether the victim is credible. *United States v. Marrie*, 43 M.J. 35, 41 (C.A.A.F. 1995); *Harrison*, 31 M.J. at 332. Finally, "percentage testimony exceed[s] the permissible bounds of expert testimony permitted in child sexual abuse prosecutions." *Brooks*, 64 M.J. at 328 (citation omitted).

In this case, the Government presented a forensic child interviewer employed by the county prosecutor's office. In trying to determine whether a child has been coached, or whether a child has, in fact, been sexually abused, the witness said she looks for certain characteristics. For example, children of 7 or 9 years of age do not have knowledge of matters such as oral sex, masturbation, or ejaculation. The expert testified that she separately interviewed each of the two children, D and S, and that the characteristics she observed in them were consistent with children who may have been sexually abused. Record at
649-53.

There was no defense objection to this testimony, and, regardless, we conclude that this testimony did not exceed the bounds of permissible testimony. *Birdsall*, 47 M.J. at 409-10. Even so, the military judge *sua sponte* instructed the members that "no witness is a human lie detector"; and, "no one who testifies in this courtroom can know if someone else is telling the truth or lying." He

further instructed that only the members can determine credibility, and that "[n]o witness, including an expert witness, can testify that someone else's account of what happened is true or credible." Record at 653-54. There was no defense objection to the military judge's instruction, nor was there any request for additional limiting instructions.

Following the military judge's curative instruction, the expert acknowledged occasions in which she interviewed a child suspected of being abused, which "later turned out to be false." *Id.* at 656. She also testified that "cases in which a child makes up something or lies . . . is rare. I would say 1 out of 100 or 1 out of 200." *Id.* at 661. Again, there was no defense objection or request for instructions.

The Government all but concedes the expert witness' percentage reference constitutes error under *Brooks*, but asserts that the military judge cured any prejudicial impact by his prompt instructions. Government Answer of 16 Jul 2008 at 17. While we accept that the expert witness' testimony was error, it was not plain or obvious, and was harmless under the circumstances in this case.

In assessing the alleged error as plain or obvious, we have considered the fact that the *Brooks* decision was not published until six years after the appellant's trial. *See United States v. Nieto*, 66 M.J. 146, 150 (C.A.A.F. 2008). Furthermore, in *Brooks*, 64 M.J. at 329, the court cited one state case in direct support for the holding that an expert's opinion testimony is improper if it includes a statistical

probability of similarly situated "victims" falsifying their complaints. *Powell v. State*, 527 A.2d 276 (Del. 1987). This case did not represent generally applicable federal criminal law, and no military case before *Brooks* directly addressed percentage estimates of false reports. Thus, at the time the military judge admitted the erroneous testimony, he did so without benefit of *Brooks* or other binding precedent regarding percentage testimony. *See Nieto*, 66 M.J. at 150.

There was, however, existing precedent that proscribed comment on the credibility of a putative victim. *See United States v. Arruza*, 26 M.J. 234, 237 (C.M.A. 1988); *Harrison*, 31 M.J. at 332; *United States v. Cacy*, 43 M.J. 214, 218 (C.A.A.F. 1995); *Birdsall*, 47 M.J. at 410. Indeed, these cases were cited in *Brooks* as the underpinnings of that decision, but none extended the growing body of "lie detector" case law specifically to percentage estimates. Thus, we conclude that it was error for the military judge to admit the expert's estimate of false complaints. However, in the broader context of her testimony, when the military judge had just specifically limited her testimony with an instruction addressing "human lie detector" testimony, consistent with then-existing precedent, we do not find his error to have been plain or obvious.

Nevertheless, assuming without deciding that the error was obvious, we next determine "whether [the appellant] has sustained his burden of demonstrating that the error materially prejudiced his substantial rights." *Brooks*, 64 M.J. at 329. Analysis of the weight of the evidence and the

military judge's remedial actions were the principal considerations in *Brooks*. *Id.* We will assess the same considerations here.

The expert witness made only one statement including percentage information. That testimony was placed in context by two questions related by the military judge:

> MJ: Well, counsel let me stop you there. Instead of asking the witness what she thought the question meant, let me just reread the question to the witness. And the question was: Have you ever had an interview that at first was judged to be a case of abuse but later turned out to be false?
>
> Wit: Okay. The answer again would be yes. *I need to say that when I do an interview, I do not give an opinion. I simply take the child's statement.*
>
> . . . .
>
> TC: How what would be the frequency that this would have happened that we just described?
> A: There's certainly cases in which a child makes up something or lies; and, again, it is rare. I would say 1 out of 100 or 1 out of 200.
>
> . . .

> MJ: Ma'am, I have a question for you. Because you are a forensic interviewer, in the situation that you just described, do you have any forensic, that is, scientifically accurate way of proving whether the child is telling the truth or not? In other words, in a case where you say that you believe the child's not telling the truth, the only way that you typically could know that is if the child later comes forth and says, 'Yes, I made it up," or in the case where the child makes a complaint against someone that has sexually molested them, unless that person ultimately confesses, *you would ultimately never know who was telling the truth and who wasn't: is that correct?*
>
> Wit: *That's correct.*

Record at 660-61 (emphasis added).

In this context, it was clear that the percentage estimate was not the result of any peer-reviewed study, nor was it supported by any data set or reference, other than the impromptu reflection of the witness about her own experience. We conclude that the weight of the offending reference, in the context of the expert's overall testimony, was not substantial.

Furthermore, and of paramount importance in this case, the Government presented evidence of

substantially more than a "he said, she said" case. The Government introduced evidence that the appellant possessed pornography, which the children testified he had shown to them. Child pornography was also found on his computer, along with the remnants of an online chat: "anyone else have sex with their dad" and "I wasn't lucky enough to have sex with my little girl, but watching her in the shower was good enough!!!".[4] In addition, there were two child victims, both of whom testified at trial, and both directly and graphically testified about the appellant's misconduct with them. D, then ten years old, testified that once her hands were on the appellant's penis "I had to go up and down on his private[s]" and that "white stuff came out of it" onto a napkin. Record at 727-28, 735. Her younger sister, eight-year-old S, testified that the appellant "put my hands on it and made me go with my hands up and down." She also described that "white stuff came out" the top. Record at 762-63. She went on to describe that the appellant had her touch his penis "with [my] mouth" and that he "put his private into mine" which "hurt" and felt "stretched." Record at 775-76.

Additionally, the Government presented medical testimony that the children did not have any discernible physical signs of penetration, but that this was not inconsistent with the children's description of what happened. The expert testimony indicated that a description of a feeling of

[4] The admission of the pornography was the subject of a proper limiting instruction by the military judge. Record at 615-16.

"stretching" without breaking the hymen would leave no discernible injury, even with some penetration. Record at 663-92. The Government's case also included testimony of the children's mother and a third-party who observed the children react in fright, running and hiding, when their father came to their mother's home unexpectedly.

The defense case included a strategy of discrediting the children's mother, ascribing a motive to fabricate the abuse in order to terminate the appellant's visitation, and to prove that the children had been coached. Though we perceive no persuasive indication in the record that the children had been coached, in the course of cross-examination, the children's mother did agree with the defense counsel's characterization that her custody battle with the appellant was, at times, "pretty nasty." *Id.* at 552-62. In his defense, the appellant also presented his current mother-in-law, who testified about the appellant's good relationship with his daughters and their desire to live with him and not go back to their mother's home. The grandfather of the appellant's wife testified similarly. Finally, the defense presented the appellant's chaplain, who testified the appellant was distraught over the charges.

In the context of these facts, the clear connection between the children's testimony and that of the forensic interviewer was not her impromptu reference to the incidence of false reports, but to her testimony that children of these ages do not know about oral sex, masturbation or ejaculation. We conclude that the appellant's possession of

pornography and child pornography, combined with the children's graphic testimony in age-appropriate terms, but concerning matters about which they should not know, amounted to a strong case against him. The single reference made by the forensic interviewer about the incidence of false reports had no substantial role in the case.

With respect to the military judge's remedial actions, our superior court held that "'the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such [percentage] testimony.'" *Brooks*, 64 M.J. at 330 (quoting *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003)). This is because a delayed instruction would impact the paradigm from which the members view other evidence. In *Brooks*, no objection was made to the offending lie detector testimony, and the military judge provided only standard cautionary instructions to the members before deliberation on findings. That was held to be reversible error.

In this case, the military judge gave prompt and specific limiting instructions during the expert's testimony, when he first detected potential error. Record at 653-54. Thus, when the witness minutes later testified as to her opinion about the frequency of false victim reports, this testimony was already in the context of the cautionary, limiting instruction about "lie detector" testimony. As such, the testimony did not affect the paradigm in which other evidence was viewed. The military judge additionally intervened to elicit clarifying testimony,

and he provided instructions on the credibility of witnesses prior to the members adjourning for deliberations. At that time, he also included instructions regarding expert witnesses, specifically including the further admonition that "the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness and no other witness can testify that the alleged victim's account of what occurred is true or credible." Record at 923; *see also* Record at 927; Appellate Exhibit LXXI at 11, 13.

Based on the foregoing, we conclude that the military judge's specific instruction immediately preceding the offending testimony, his intervention in clarifying the expert's testimony, and his later repeated instructions, combined to prevent any material prejudice to the substantial rights of the appellant that otherwise might have resulted from the limited role of the improper expert testimony. We hold the military judge's error in allowing the percentage reference to false complaints was neither plain nor obvious, but if it was, it was harmless.

Speedy Review and Appellate Processing

In his fourth assignment of error the appellant claims that he was denied due process based upon excessive post-trial delay and this court's failure to consider his supplemental assignments of error.[5] In

[5] The appellant's 25 October 2005 Motion to File Supplemental Assignments of Error, which was denied on 3 November 2005, lists the Supplemental Assignments of error and provides a brief summary of each, as follows:

this court's original opinion, the issue of post-trial delay was extensively reviewed. We have again carefully considered the matter and we adopt our predecessor panel's disposition of that portion of delay which preceded the remand of this case. *Mullins*, 2006 CCA LEXIS 327 at 44-45. We will address, *infra*, any delay from the remand forward. First, however, we will address the supplemental assignments of error. We begin by noting that these were previously considered and denied. *See Mullins* at n.8. We do so again.

During extensive post-trial litigation, the appellant filed a petition for extraordinary relief with the CAAF regarding his appellate representation. That court issued an order to this court directing an inquiry into whether the appellant was represented by counsel, and if not, whether he desired representation. Order of June 28, 2005. In as much as the current assignment of error includes the appellant's complaint about the adequacy of this court's inquiry, it has been rendered moot. Our

I. The NMCCA's refusal to ensure personal service of all documents on the Appellant, as opposed to Appellant's counsel denied him due process and interfered with his constitutional rights; and

II. The NMCCA erred in failing to answer the CAAF's specific questions in its 28 June 2005 order regarding the status of his representation by counsel and his petition for extraordinary relief. The appellant also filed a Motion to Reconsider in December 2005, elaborating on the substance of his complaint regarding this court's response to that CAAF order.

superior court denied his petition on September 14, 2005, after receiving the response of this court dated 22 August 2005. *Mullins v. Judges of the U.S. Navy-Marine Corps Court of Criminal Appeals*, 62 M.J. 216 (C.A.A.F. 2005).

As to the portion of the supplemental assignment of error alleging failure to ensure personal service upon the appellant, we note that the record reflects compliance with the rules of court regarding service upon assigned counsel. Many also reflect service personally upon the appellant. Even assuming an error for failure to personally serve the appellant with any particular document, he has not articulated any specific prejudice to a substantial right that resulted from his not having been personally served. He has participated directly, and with counsel, in every aspect of his appeal, and his assignments of error have received the benefit of counsel and the attention of this court. Thus, no relief is warranted.

As to the remaining portion of this assignment of error alleging post-trial delay, we previously adopted this court's prior decision as our own. Additionally, we have considered the time required to process and dispose of the remand of this case in view of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). In doing so, we first note that this matter was remanded on 9 May 2008, and docketed with this court less than one week later, on 15 May 2008. Given the ten volumes of material that now comprise this case, we conclude that the two months consumed by counsel to brief their respective

positions is not facially unreasonable. *Id.* at 135. The nine months required for a new panel of this court to master the voluminous record and to responsibly consider the appellant's multiple assertions of error is neither facially unreasonable, nor presumptively so. *Id.* at 142. Finding no unreasonable additional delay to trigger a due process analysis, we move to consider whether the delay, nevertheless, merits relief under our broad authority under Article 66(c), UCMJ.

We have reconsidered all of the delay in this case, and the facts attendant thereto, in light of the factors enunciated in *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States (Toohey I),* 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Brown*, 62 M.J. 602, 607 (N.M.Ct.Crim.App. 2005)(en banc); as well as the guidance in *Toohey I*, and *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002). We conclude that the delay in this case does not impact the findings or the sentence that should be approved and we decline to grant relief. Art. 66(c), UCMJ.

Factual and Legal Sufficiency of Child Pornography Charge

The appellant again raises legal and factual sufficiency of Specification 4 of Charge III, and alleges that since the military judge instructed the members using a definition of child pornography later held unconstitutional by the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), we cannot affirm the conviction.

The Government concedes that the military judge's instruction included language later struck down in *Ashcroft*. However, citing *United States v. Cendejas*, 62 M.J. 334 (C.A.A.F. 2006) and *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006), the Government argues that we may affirm because the erroneous instruction had no impact on the members. Government Answer of 16 Jul 2008 at 14. Due to the loss, subsequent to our earlier decision in this case, of Prosecution Exhibits 7-17, which contained the images at issue, we are now unable to assess the legal and factual sufficiency of the conviction, or to assess the merits of the assigned error.[6] Accordingly, we set aside the findings of guilty to Specification 4 of Charge III.

Because of the immediately foregoing action, and in light of this court having previously set aside Specification 3 of Charge III, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon doing so, we are satisfied beyond a reasonable doubt that, in the absence of Specifications 3 and 4 of Charge III, relating to possession of child pornography, the sentence adjudged would have been no less than that originally adjudged for the remaining charges, which include the rape of a child under 16 years of age, the sodomy of a child under 16 years of age, and two specifications of indecent acts upon a child under 16

[6] Government Response to Court Order of 5 May 2009.

years of age.

Evidence of Other Acts

The appellant asserts that the military judge erred when he denied the defense motion to preclude introduction of evidence of a chat room conversation dialogue found on a computer in the appellant's home.[7] The dialogue consisted of two written sentences discovered on the appellant's computer hard drive: "anyone else have sex with their dad" and "I wasn't lucky enough to have sex with my little girl, but watching her in the shower was good enough!!!"

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004). For the reasons set forth in our predecessor panel's opinion, which we adopt, we conclude the military judge did not abuse his discretion, and we decline to grant relief.

Conclusion

We have reviewed the record, the appellant's

[7] This assignment of error was previously the seventh assignment of error.

assignments of error, the Government's response, and all pleadings and filings of the parties, including orders of our superior court. Although not specifically raised again, we have reconsidered all the assignments of error originally raised before this court, and we resolve them consistent with this court's previous decision, except as set forth above. The findings of guilty to Specifications 3 and 4 of Charge III are set aside. Following our corrective action, we conclude that the remaining findings and the sentence, as reassessed, are correct in law and fact, and that no error exists that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ. The remaining findings and the sentence, as reassessed, are affirmed. The supplemental court-martial promulgating order shall reflect our action.

Senior Judge COUCH and Judge MAKSYM concur.

For the Court

R.H. Troidl
Clerk of Court

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

10 U.S.C. § 871(c)(1)

Execution of sentence; suspension of sentence

(c)

(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and

> (A) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;
>
> (B) such a petition is rejected by the Court of Appeals for the Armed Forces; or
>
> (C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(ii) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

10 U.S.C. § 876a

Leave required to be taken pending review of certain court-martial convictions

Under regulations prescribed by the Secretary concerned, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action under this subchapter if the sentence, as approved under section 860 of this title (article 60), includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The accused may be required to begin such leave on the date on which the sentence is approved under section 860 of this title (article 60) or at any time after such date, and such leave may be continued until the date on which action under this subchapter is completed or may be terminated at any earlier time.

Secretary of the Navy Instruction 1050.1A

DEPARTMENT OF THE NAVY
SECNAVINST 1050.1A

Office of the Secretary
NMPG83
Washington, D.C. 20350-1000
1 May 1986

SECNAV INSTRUCTION 1050.1A
From: Secretary of the Navy
To: All Ships and Stations
Subj: LEAVE FOR MEMBERS AWAITING REVIEW OF PUNITIVE OR ADMINISTRATIVE SEPARATION

Ref:
(a) DOD Directive 1327.5 of 24 Sep 85 (NOTAL)
(b) Title 10 U.S.C. 876a (Article 76a, UCMJ)
(c) SECNAVINST 1910.4A (NOTAL)
(d) SECNAVINST 1920.6A
(a) Title 37 U.S.C. 501

1. Purpose. To revise the program of required and permitted leave for members awaiting review of punitive discharges, or dismissals, or administrative discharges for cause, and to implement the provisions of references (a) and (b).

2. Cancellation. SECNAVINST 1050.1

3. Summary of Changes. This instruction is a complete revision. There are no symbols to denote deletions, additions or revisions.
4. Applicability. This instruction applies to all active duty personnel throughout the Department of the Navy (DON) and is effective immediately. This instruction has prospective effect only, and does not affect those members who may currently be on leave awaiting review of punitive discharges, or dismissals, or administrative discharges.

5. Definitions. The following terms are used in this instruction:

a. Leave Authorized absence from a place of duty, chargeable against the member's leave account.
b. Excess Leave Leave granted in excess of earned leave during which the member is not entitled to pay and allowances.
c. Accrued Leave Leave earned by a member and credited to the leave balance as of any given date.
d. Appellate Leave Required or permitted leave for members awaiting review of a punitive discharge or dismissal.
e. Administrative Separation Leave Permitted leave for members awaiting completion of administrative processing for separation for cause.

6. Policy. It is DON policy to use required and voluntary leave to aid in removing from the presence of the active force, as expeditiously as possible, those members being punitively discharged, dismissed or separated for cause. This will promote readiness by

maintaining the highest standards of conduct and performance throughout the naval service. In furtherance of this policy, members may be required or permitted to take leave while awaiting appellate review of a punitive discharge or dismissal, or awaiting completion of administrative discharge proceedings, under the procedures specified in this instruction. Members being administratively separated for other reasons also may be granted leave when it is in the best interest of the command.

7. Appellate Leave

a. The member may be required to begin appellate leave at any time on or after the date the sentence of the court-martial is approved, in whole or in part, by the convening authority, provided the approved sentence includes an unsuspended and unremitted dismissal or punitive discharge and the member is no longer in confinement.
b. If the approved sentence of the court-martial includes a sentence to confinement, the period of confinement must have been served, remitted, suspended or deferred prior to the commencement of appellate leave.
c. If all confinement has been served or deferred, but the sentence of the court-martial is pending approval by the convening authority, the member may be permitted to take appellate leave if the member so requests. All requests must be in writing and signed by the member.
d, Upon approval of the sentence by the convening authority, appellate leave status shall be changed from permitted to required appellate leave. The

member shall be notified of the change to appellate leave status. Such required leave may be continued until a time when final review of the case is completed and the punitive discharge or dismissal ordered into execution.
c. Competent authority may terminate appellate leave at any time by written notification to the member.

8. Administrative Separation Leave. Leave may be granted to members awaiting administrative separation for cause under references (c) or (d) when the commanding officer recommends separation, or in cases requiring an Administrative Board or Officer Board of Inquiry when the Board recommends separation and the member's commanding officer concurs in the recommendation. Members being processed for separation for cause shall be encouraged to take leave. The leave must be based upon written request of the member. Accrued leave must be used before excess leave.

9. Authority to Grant Appellate and Administrative Separation Leave. Appellate leave may be authorized by any officer exercising general court-martial jurisdiction over the member. In the case of a special court-martial conviction, an officer exercising special court-martial jurisdiction over the member may authorize appellate leave. Administrative separation leave may be authorized by an officer in command authorized to grant leave to the member.

10. Leave and Pay Accrued

a. Members permitted to take appellate or administrative separation leave shall be charged with any accrued leave until such leave is exhausted. Any leave beyond that will be charged as excess leave.
b. Members who have accrued leave to their credit may elect one of the following options prior to commencing required appellate leave:
(1) Receipt of pay and allowances during the period of appellate leave, until all accrued leave is exhausted. The remaining period of leave will be considered to be excess leave (without entitlement to pay or allowances).
(2) Payment for accrued leave on the day before leave commences, subject to the limitation on payment for accrued leave contained in section (f) of reference (e). The total period of leave will be considered to be excess leave (without entitlement to pay or allowances).
c. Members whose punitive discharge or dismissal subsequently is disapproved or set aside will be entitled to pay and allowances for any period of required appellate leave charged as excess leave, unless a rehearing or new trial is ordered which results in a sentence that includes a dismissal or a punitive separation. Any entitlement to pay and allowances under this provision shall be reduced by the amount of income and public assistance benefits received by the member during the period of required excess leave.

11. Responsibility. The Chief of Naval Operations and the Commandant of the Marine Corps are responsible for implementation of the appellate and

administrative leave program to meet the objective of paragraph 6.

JAMES F. GOODRICH
Under Secretary of the Navy